

The Exceptional Case of Parental Negligence

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Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 Ala. L. Rev. 533 (2013).



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Recently, there has been a flowering of family law scholarship critically examining what Janet Halley calls “family law exceptionalism,” the tendency in the law to treat the family as a special realm wholly divorced from market relations and to steer family matters, regardless of their economic nature, into family law. Although she never uses the term “family law exceptionalism,” Elizabeth Porter’s new article on parental immunity and negligent supervision cases follows in this vein. The article is an indictment of what she regards as the exceptionally favorable treatment of parents under current tort law. Professor Porter argues for ending the special rules favoring parents, applying ordinary negligence principles in parental liability cases, and ultimately sending more cases to the jury.

As Porter reminds us, it is a particularly appropriate time to re-examine the rules governing parental liability. On the cultural front, the steady stream of tragic cases (whether Newtown, Columbine or countless accidental shootings) has reignited perennial questions about the extent of parental responsibility to control dangerous children and whether parents should be held accountable to victims for their failures as parents. On the doctrinal front, the new approach to duty endorsed by the Restatement (Third) of Torts—which calls for presuming a general duty of care and abandoning that presumption only in exceptional cases when there are strong countervailing reasons of principle or policy—has the potential to reopen questions about the scope of parental liability.. Porter’s article suggests that if courts heed the Third Restatement they may well conclude that parental liability cases are not so exceptional after all, ushering in what would be a major, very concrete change in tort doctrine.

This article appears to be Porter’s first published piece of scholarship (she is currently a VAP at the University of Washington). Porter certainly deserves praise for choosing an undertheorized topic and writing an engaging history of two quite different types of parental liability claims – claims brought by children against their parents (implicating parental immunity) and claims brought against parents by third parties (negligent supervision claims). To date, torts scholars have not paired these two types of claims and analyzed them together. As a result, Porter claims that they (and the courts) have failed to appreciate the contradictory narratives of the family that are used to justify exceptional treatment of parents. In cases implicating parental immunity, for example, courts continue to immunize parents based on the view that parents know their own children best and know best how to handle them. In negligent supervision cases, by contrast, courts are often reluctant to impose liability unless the parent has specific notice of the child’s dangerous propensity, endorsing a view that parents may not know what their children are up to and may be powerless to control them.

With respect to parental immunity, Porter complains that feminists failed to finish what they started. She claims that feminist arguments against the patriarchal family succeeded in getting rid of interspousal immunity. But Porter faults feminist critics for not campaigning as vigorously against parental immunity, which made it impossible, for example, for a teenage girl to sue her father for rape, in the name of preserving family harmony. Particularly because many of the tortfeasors in these cases are mothers, Porter believes that feminists have failed to protect children because they were blinded by their own “violence against women” lens against seeing women as aggressors.

In this respect, Porter exaggerates the influence of feminism on tort law, saying not a word about how the lifting of interspousal immunity has failed to make a dent in tort law’s pitiful record of addressing violence against women, most prominently domestic violence. Her thesis would have been strengthened, not undermined, by recognizing that the same family law exceptionalism that supports parental immunity likely also underwrites tort law’s reluctance to provide effective remedies for sexual violence and exploitation. Notably, in addition to making negligent parents liable to their children, Porter would also permit third party tortfeasors to seek contribution from negligent parents when there is joint liability. Most jurisdictions now enable children to sue negligent third parties and recover 100% of their damages— even if the parent is also negligently responsible for the child’s harm— because most courts interpret the parental immunity as extending to contribution suits brought by 3d party tortfeasors. Here, Porter’s child-centered approach is more interested in being “fair” to all parties than it is in enabling children to recover for all of their losses.

The heart of Porter’s article deals with negligent supervision cases. She makes a strong case for lifting limited duty rules and subjecting parents to ordinary negligence principles, even criticizing the modified “reasonable parent” standard that some “liberal” courts now use. Porter doesn’t mince words here, calling some of the courts’ no-duty determinations “ridiculous” and their reasoning “tortured.” In her view, many courts have let their fears get the best of them, creating a one-sided tort law that recognizes parental rights but not parental responsibilities. This is where the “helicopter parents” come into play. Porter explains that there is a fear that evolving norms embraced by some parents (e.g., those hovering, middle-class mothers who overshelter their children) will lead to unrealistic requirements for all parents via the threat of negligence liability. Porter believes that these fears are overblown, even though she admits that there will be hard cases, particularly cases involving damage done by seriously troubled teens where the imposition of tort liability might prove to be a disincentive for beleaguered parents to continue to allow their child(ren) to live at home.

For Porter, it all comes down to how much one trusts juries, rather than judges, to decide the hard cases and determine whether the everyday decisions of parents warrant exceptional treatment in the law. I am not quite as confident as Porter that there is nothing special about parents when they are cast as tort defendants, but I am sure that this is the best current article on the topic.

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